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In The
UNITED STATES SUPREME COURT

OCTOBER TERM, 1998

Roger Reeves, *Petitioner,*

vs.

Sanderson Plumbing Products, Inc., *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 50, should a District Judge weigh all of the evidence or consider only the evidence favoring the non-movant?

3. Whether the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Roger Reeves, Plaintiff/Appellee;

2. Sanderson Plumbing Products, Inc., Defendant/Appellant;

3. Jim Waide, Attorney for the Plaintiff/Appellee; and

4. Taylor B. Smith, Attorney for the Defendant/Appellant.

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No: _____

In The

UNITED STATES SUPREME COURT

October Term, 1998

Roger Reeves, *Petitioner,*

vs.

Sanderson Plumbing Products, Inc., *Respondent.*

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of appeals for the Fifth Circuit entered on April 22, 1999, Petition for Rehearing En Banc denied June 18, 1999, by a Writ of Certiorari under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C.S. § 623 (a) which says: "It shall be unlawful for an employer -- (1) ... to discharge any individual or otherwise discriminate against any individual ... because of such individual's age . . . "

STATEMENT

A jury in the United States District Court for the Northern District of Mississippi found that Petitioner, Roger Reeves, was fired because of his age. The United States Court of Appeals for the Fifth Circuit reversed, holding that Respondent was entitled to judgment as a matter of law under Fed. R. Civ. P. 50 because Petitioner failed to produce evidence sufficient to satisfy its "pretext plus" standard for submitting an age discrimination case to the jury.

(FACTS)

Petitioner, Roger Reeves, worked for Respondent, Sanderson Plumbing Products, Inc., for forty (40) years before he was fired at age fifty-seven (57). (R. at 1-4) Two (2) months before Reeves was fired, Powe Chestnut, Director of Manufacturing, and the "absolute power" at the company (R. at 80-86), told Reeves he was "too damn old to do the job." (R. at 26, 59) By the time of trial, Respondent had utilized three (3) different replacements for Reeves. All were in their thirties. (R. at 101-102, 224)

Respondent claimed Reeves was fired because an investigation revealed overpayment of hourly employees, and that Reeves failed to reprimand employees who were absent or tardy. (R. at 113, 115, 119)

In rebuttal, Reeves produced evidence that his subordinates were on time and that, in any event, his superior productivity records show that the company was not suffering any losses because of alleged absences or tardies of workers. (R. at 18-19, 73, 241-245, 246-249) Furthermore, failing to reprimand employees who were absent or tardy could not have been the reason for his discharge, since he was not the person responsible for giving reprimands. (R. at 20-21)

The United States Court of Appeals for the Fifth Circuit agreed Plaintiff produced sufficient evidence that the reasons given for Reeves' firing and replacement by younger persons were pretextual. (Op. at 9). However, the Fifth Circuit concluded that: "Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision." (Op. at 9).

Applying this "pretext plus" test, the Fifth Circuit found the evidence insufficient because the age-based statements were made by only one of three (3) decision makers, and because Reeves did not otherwise prove "a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence." (Op. at 1) In finding there was not substantial evidence of age discrimination, the Fifth Circuit relied upon the Respondent's (movant's) evidence, that two (2) of the decision makers were themselves over age fifty (50) and that Respondent had also accused other workers of inaccurate record keeping, including a thirty-five (35) year old. Appellee's brief, p. 5.

In requiring direct evidence of age discrimination, and in relying upon evidence produced by the movant in deciding a

Rule 50 motion, the United States Court of Appeals for the Fifth Circuit differs from other circuits.

I. THIS COURT SHOULD GRANT CERTIORARI SINCE THERE IS A SPLIT IN THE CIRCUITS WITH RESPECT TO WHETHER PROOF OF PREFERENTIAL TREATMENT FOR A MEMBER OF THE PREFERRED CLASS. FOR PRETEXTUAL REASONS, IS SUFFICIENT TO PRESENT AN EMPLOYMENT DISCRIMINATION CASE TO THE JURY.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated: "... [R]ejection of defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (Emphasis added).

Some circuits hold the above language from *Hicks* means that proof of a *prima facie* case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent.

The Fifth Circuit is one of the circuits using the "pretext plus" (direct evidence) test for determining the sufficiency of the evidence to present an employment discrimination case to the jury.[1] *Walton v. Bisco Indust., Inc.,* 119 F.3d 368, 370 (5th Cir. 1997) (stating a reason cannot be proved to be a

[1]While *Hicks* was decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, all circuits agree *Hicks* governs age discrimination cases.

pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason).

Several circuits agree with the Fifth Circuit that there must be additional evidence, other than evidence of a *prima facie* case, and pretext evidence, in order to create a jury question. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (stating the Supreme Court in *Hicks* did not mean *prima facie* case plus proof of pretext was always sufficient to present a jury question); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (stating to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but that discrimination was the real reason).

Other circuits have held that the elements of a *prima facie* case, plus evidence of pretext, are sufficient to create a jury issue. *See Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224-25 (2d Cir. 1994) (stating intentional age discrimination may be demonstrated by reliance on the evidence that established the *prima facie* case and proof of pretext without necessity for any additional evidence); *Sheridan v. E.I. Dupoint de Nemours & Co.,* 100 F.3d 1061, 1069 (3rd Cir. 1996) (stating evidence which supports a *prima facie* case, coupled with the jury's determination that employer's proffered explanations were pretextual is sufficient to support a verdict of discrimination); *Fuentes v. Perski*, 32 F.3d 759, 761 (3d Cir. 1994) (stating to survive a motion for summary judgment, the plaintiff must introduce evidence which will cast doubt upon the reasons offered by the defendant so that the jury may infer that discrimination was the motivating factor); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994) (stating fact-finder may find in the plaintiff's favor when a *prima facie* case of discrimination is established and plaintiff shows the falsity of the employer's proffered reasons); *Courtney v.*

Biosound, Inc., 42 F.3d 414. 418 (7th Cir. 1994) (stating plaintiff will defeat a motion for summary judgment by producing evidence from which a jury could infer that the company's proffered reasons were pretextual); *Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir. 1994) (stating once plaintiff establishes *prima facie* case, and raises genuine question as to whether the employer's explanation is true, there will always be a question for the fact-finder); *Combs v. Plantation Patterns,* 106 F.3d 1519, 1529 (11th Cir. 1997) (stating plaintiff in a discrimination case can avoid judgment as a matter of law by proving the *prima facie* case and showing that the defendant's reasons are a pretext); and *Barbour v. Merrill,* 48 F.3d 1270, 1277 (D.C. Cir. 1995) (stating plaintiff only needs to establish a *prima facie* case and introduce evidence to discredit the defendant's proffered reasons in order to create a jury issue).

This split in the circuits has been discussed by legal commentators. *See* Catherine J. Lanctot, *Pretext-Plus After Hicks: The Circuit Split Remains, Wiley Employment Law Update* 161 (1996); C. Pledger, *Rhodes v. Guiberson Oil Tools: The Fifth Circuit's Approach to Pretext Evidence in Employment Discrimination*, 57 LA. L. REV. 1393; Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57 (1991).

Besides the split in the circuits, this Court should also review this case since the approach of the Fifth Circuit is inconsistent with the indirect evidence method of proof mandated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), and followed in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981), and *Hicks*, 509 U.S. at 502 (1993). The theory underlying *McDonnell-Douglas* and its progeny is that an employer in an employment discrimination case will not

ordinarily admit employment discrimination. Because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof. Requiring direct evidence (i.e., "pretext plus") cannot be reconciled with *McDonnell-Douglas* and its progeny, which hold direct evidence is not required.

II. CERTIORARI SHOULD BE GRANTED SINCE THE FIFTH CIRCUIT'S WEIGHING OF ALL THE EVIDENCE IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS WHICH CONSIDER ONLY THE EVIDENCE FAVORING THE NON-MOVANT, AND SINCE THIS APPROACH FAILS TO TAKE INTO ACCOUNT THIS COURT'S TEACHING THAT THE STANDARDS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 AND GRANTING SUMMARY JUDGMENT UNDER RULE 56 ARE THE SAME.

In reversing the jury verdict, the Fifth Circuit applied the standard it adopted in its leading case, *Boeing v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*):

> On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence - not just that evidence which supports the non-mover's case ... If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper ... there must be a conflict in substantial evidence to create a jury question ...

The Fifth Circuit's weighing of all the evidence, rather than determining only whether non-movant's evidence

supports the verdict, is contrary to the rule in other circuits. Dissenting from this Court's denial of certiorari, Justice White described the conflict in the circuits as follows:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the non-moving party. This is also the position of at least the Fifth and Seventh Circuits. *Boeing Co. v. Shipman,* 411 F.2d 365, 374-75 (CA 5 1969); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 281-282 (CA 7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. *Simpson v. Skelly Oil Co.,* 371 F. 2d 563 (CA 8 1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. *Layne v. Vinzant*, 657 F.2d 468, 472 (CA 1 1981); *Inventive Music Ltd. v. Cohen,* 617 F.2d 29, 33 (CA 3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue.

Venture Technology, Inc. v. Nat'l Fuel Gas Distribution Corp., 459 U.S. 1007, 1009 (1982). *See also Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1993) (stating "Generally, only evidence favoring the non-moving party should be considered").

The Court of Appeals' decisions which have rejected the Fifth Circuit's consideration of all of the evidence and consider only the evidence which supports the non-movant are: *CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 46 F.3d 1211, 1214 (1st Cir. 1995); *Casko v. Elgin,*

Joliet and Eastern Ry. Co., 361 F.2d 748, 749 (7th Cir. 1966); *Lyons v. J.C. Penney Co.,* 316 F.2d 753-54 (7th Cir. 1963); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566-67 (8th Cir. 1967); *Kingston v. McGrath,* 232 F.2d 495, 497 (9th Cir. 1956). *See also* Judge Rivers' dissent in *Shipman*, 411 F.2d at 381-82 (5th Cir. 1961) (Rivers, J., dissenting) (consideration of all the evidence is inconsistent with this Court's precedents).

The Fifth Circuit's continued adherence to the *Shipman* standard is also inconsistent with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-253 (1986). *Anderson* holds that the standards for a directed verdict are the same as those for summary judgment under Rule 56:

> The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." ... and we have noted that the "genuine issue" summary judgment standard is "very close" to the reasonable jury" directed verdict standard: "The primary difference between the two (2) motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." ... In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. [internal citations omitted]

Anderson v. Liberty Lobby, 477 U.S. at 251-252.

Contrary to the Fifth Circuit, some courts hold that the Rule 56 standard also applies under Rule 50. *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (stating standard for judgment as a matter of law is essentially identical to "genuine issue" requirement in summary judgment context); *Deimer v. Cincinnati Sub-Zero Prodos*, 58 F.3d 341, 343 (7th Cir. 1995) (stating we now adopt the federal reasonable person's standard across the board: pre-trial, mid-trial, post-trial, and on appeal, for evaluating both the merits and the quantum of relief. Contrary decisions are no longer authoritative); *Schoonejongen v. Curtis Wright Corp.*, 143 F.3d 120, 129 (3rd Cir. 1998) (stating standard for summary judgment is the same standard as standard for motion for judgment as a matter of law).

If the Fifth Circuit had applied the *Anderson* teaching that the Rule 56 standard also governs Rule 50 -- then the Court of Appeals would not have reversed the jury verdict. Statements of age bias by a decision maker would obviously have created "issues of material fact" as to whether age was the reason for the decision.

CONCLUSION

This case presents important questions of the role of the jury in employment discrimination cases. The courts of appeals have taken different approaches on this issue; therefore, review by this Court is warranted.

Respectfully submitted,

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APPENDIX "A"

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60334

ROGER REEVES,

Plaintiff-Appellee,

versus

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(96-CV-197)

Before HIGGINBOTHAM, JONES and WIENER, Circuit Judges.
Per Curiam:*

In this age discrimination case, Defendant-Appellant Sanderson Plumbing Products, Inc. ("Sanderson") appeals the district court's order denying Sanderson's post-verdict motion for judgments as a matter of law ("JML"), and granting Plaintiff-Appellee Roger Reeves's motion for front pay. After reviewing the record, we conclude that Reeves did not prove a violation of the Age Discrimination in

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Employment Act ("ADEA") by a preponderance of the evidence. Hence, we reverse the district court's order and render judgment in favor of Sanderson.

I

FACTS AND PROCEEDINGS

Fifty-seven year old Reeves was employed for 40 years by Sanderson - a company involved in the manufacture of toilet seats and covers. At the time of his discharge, Reeves worked in a department of the company known as the Hinge Room. The Hinge Room ran a regular line which was supervised by Reeves, and a special line which was supervised by 35 year old Joe Oswalt. Forty-five year old Russell Caldwell was the manager of the department and he supervised both Reeves and Oswalt.

At all times relevant to this case, a union represented Sanderson's production and maintenance employees. The union contract included general work rules, part of which dealt specifically with attendance. Pursuant to these rules, and employee who was absent from work in excess of five percent of his scheduled hours in a month, or who was late twice in a month, was subject to disciplinary action.

As part of his essential duties as a supervisor, Reeves was required to keep daily, weekly, and monthly records of the attendance and tardiness of employees under his control. These records were reviewed by Reeves for accuracy before he passed them on to Caldwell, who then sent them on to data processing.

In the fall of 1993, Sanderson' s Department of Quality Control - under the direction of Powe Chesnut - conducted a review of the operating procedures in the Hinge Room. According to Sanderson, the study revealed productivity problems on Reeves's regular line, stemming from a lax

assembly line operation. As a result, Reeves was placed on a 90-day probation for unsatisfactory work performance.

Nearly three years later, in the summer of 1995, Caldwell informed Chesnut - who by this time had become Director of Manufacturing - that the Hinge Room was again having difficulty meeting its production requirements due to pervasive absenteeism and tardiness. Because the Hinge Room records did not reflect employee attendance problems, however, Chesnut requested that Lucille Reeves, then-Manager of Quality Control, conduct an audit of the department's time sheets. This investigation revealed numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and Oswalt. Dana Jester, Vice President of Human Resources, conducted an independent review of the records, and confirmed Quality Control's findings. Armed with these results, Chesnut, Jester, and Vice President of Operations Tom Whitaker, recommended to Company President Sandra Sanderson[1] that Caldwell and Reeves be dismissed.[2] Ms. Sanderson - who was 52 years old at the time - heeded this advice, firing both Caldwell and Reeves in October 1995. Thereafter, Sanderson filled Reeves's position, on three successive occasions, with men in their thirties.

In June 1996, Reeves filed suit, claiming that Sanderson terminated him because of his age, in violation of the ADEA. Reeves based his claim on two age-related statements

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[1]The record is uncontradicted that Ms. Sanderson had married Chesnut in December 1988.

[2]Chesnut testified at trial that, had Oswalt not voluntarily terminated his employment several months earlier, Oswalt would have been subject to dismissal along with his co-workers, Reeves and Caldwell.

allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he "must have come over on the Mayflower," and (2) that he was "too damn old to do the job."

At the conclusion of the trial, the jury returned a verdict in favor of Reeves, awarding him $35,000 and finding that Sanderson discriminated willfully on the basis of age in its adverse employment action. After the verdict, Sanderson renewed its previous motion for JML, and moved, in the alternative, for a new trial. At the same time, Reeves filed a motion seeking front pay. The district court denied Sanderson's motions, and entered judgment in favor of Reeves in the amount $70,000 - adding $35,000 in liquidated damages to the jury's compensatory damages in that amount based on the jury's determination of willfulness.[3] In addition, the court awarded Reeves $28,490.80 in front pay, representing two years of lost income. Sanderson timely filed a notice of appeal.

II
ANALYSIS

A. Standard of Review

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."[4] We review the denial of such motions de novo, applying the same standard as the district court.[5] A JML is appropriate if the "facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not have concluded"

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[3]See 29 U.S.C. § 626 (b) (1990) (providing that "liquidated damages shall be payable only in cases of willful violations of this Act.").

[4]Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997).

[5]Nichols v. Lewis Grocer, 138 F.3d 563, 565 (5th Cir. 1998).

as the jury did.[6] Applying this standard to the instant case, the district court's judgment should be reversed only if "there is no legally sufficient evidentiary basis for a reasonable jury to find" that Sanderson discharged Reeves because of his age.[7]

B. The ADEA

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age."[8] To establish a violation of the ADEA, a plaintiff must prove, by a preponderance of the evidence, intentional discrimination on the part of his employer.[9] As direct evidence of discrimination is rare, plaintiffs may rely on indirect evidence and reasonable inferences to establish an ADEA claim under the McDonnell-Douglas burden-shifting analysis.[10]

Under this analysis, a plaintiff must first present a prima facie case, thereby establishing a rebuttable presumption of age discrimination.[11] If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a

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[6]Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 148 (5th Cir. 1995).

[7]Fed. R. Civ. Proc. 50 (a) (1).

[8]29 U.S.C. § 623 (a) (1) (1990).

[9]Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997).

[10]Id.

[11]Id. There are four elements to a prima facie case of discriminatory discharge under the ADEA, including proof that the plaintiff was (1) discharged; (2) qualified for the position; (3) within the protected class at the time of the discharge; and (4) either i) replaced by someone outside the protected class, ii) replaced by someone in the protected class but younger than the plaintiff, or iii) otherwise discharged because of his age. Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

legitimate, nondiscriminatory reason for the challenged employment action.[12] If the employer presents such evidence, then the presumptions of discrimination fades, and the plaintiff must prove that the employer's articulated reason is a pretext for unlawful discrimination.[13]

To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination "had a determinative influence on" the employer's decision-making process.[14] Age-related comments may serve as sufficient evidence of discrimination if the remarks are (1) proximate in time to the termination; (2) made by an individual with authority over the challenged employment decision; and (3) related to that employment decision.[15] Mere "stray remarks" - i.e., comments which are "vague and remote in time" - however, are insufficient to establish discrimination.[16]

1. Sufficiency of the Evidence

On appeal, Sanderson does not challenge the sufficiency of the evidence supporting Reeves's prima facie case of age discrimination.[17] Rather, Sanderson argues that it articulated a legitimate, nondiscriminatory explanation for firing

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[12]Brown v. CSC Logic, Inc., 82 F.3d 651, 654 (5th Cir. 1996).

[13]Price, 119 F.3d at 337.

[14]Id.

[15]Brown, 82 F.3d at 655.

[16]Id.; Price, 119 F.3d at 337.

[17]Indeed, when, as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983). Instead, the important inquiry is whether the plaintiff has "produced sufficient evidence for a jury to find that discrimination has occurred." Walther v. Lone Star Gas Co., 952 F.2d 119, 123 (5th Cir. 1992).

Reeves: Reeves's shoddy record keeping. Because Reeves failed to offer evidence sufficient to prove both that this reason is untrue and that age is what really triggered Reeves's discharge, argues Sanderson, it is entitled to judgment as a matter of law. We agree.

At trial, Chesnut testified that he became aware of timekeeping problems in the Hinge Room after Caldwell - the department manager - complained of inadequate production resulting from absenteeism. This complaint prompted an investigation which uncovered numerous errors in the department's attendance records. Because of specific misrepresentations and errors made by Reeves, argues Sanderson, employees under Reeves's control were being paid for time they did not work, and were not being disciplined for their habitual absenteeism and tardiness. Reeves testified that he was familiar with the company's attendance policy, as well as his timekeeping responsibilities as a supervisor under that policy. In light of this admission, argues Sanderson, Reeves's failure to keep accurate records in accordance with the policy amounts to unsatisfactory work performance, which is a legitimate, nondiscriminatory basis for dismissal.

Reeves attempts to cast suspicion on Sanderson's proffered explanation by first asserting that Sanderson's explanation changed between the time of Reeves's discharge and trial. When he was fired, claims Reeves, he was told that he had caused a specific employee to be paid for time she had not actually worked. In contrast, Reeves argues, Sanderson defended its employment decision at trial by claiming that Reeves's timekeeping mistakes had resulted in the overpayment of numerous employees. Although proof that an employer lied to its employee about its reasons for discharge does, under some circumstances, raise a "red flag"

of pretext,[18] the inconsistency noted by Reeves in this case can hardly be considered mendacious. Sanderson has, at all times, supported its decision to fire Reeves with the charge that Reeves's work performance was unsatisfactory. That Sanderson may have explained this charge at the time of dismissal with only one instance of inaccurate record keeping, but buttressed its defense by adducing evidence of other similar infractions at trial smacks more of competent trial preparation than telling a lie.

Reeves goes on, however, to challenge the veracity of Sanderson' allegation that he engaged in inaccurate record keeping at all. At trial, Reeves testified that he was always very careful to ensure that his employees arrived at their work stations on time. In addition, he claimed that any employee who was permitted to clock in early or stay late - and thereby receive additional pay - had extra work assignments to perform. According to Reeves, if any record keeping errors were made, they were the result of Caldwell's inattentiveness and not his own. Moreover, Reeves points out, at trial Chesnut was unable to testify as to the cost to the company, if any, of Reeves's alleged record falsifications. Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decisions was pretextual.

On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

In an attempt to satisfy this burden at trial, Reeves testified that Chesnut - while serving as Director of

[18]Haun v. Ideal Indus., Inc., 81 F.3d 541,546 (5th Cir. 1996).

Manufacturing - made the above-quoted age-related comments just months before Reeves was terminated. As Chesnut was one of three people who recommended his termination to Ms. Sanderson, argues Reeves, Chesnut's comments should be taken as sound evidence of the company's underlying discriminatory motives.

Reeves also expressed the belief that he was treated less favorably than Sanderson's younger employees. This belief, Reeves now claims, is confirmed by Oswalt's testimony that Chesnut treated Reeves like a child. As further evidence of Sanderson's disparate treatment, Reeves points to his 1993 probation, and notes that the 30-something Oswalt was not put on probation despite a similarly lagging production level on the Hinge Room's special line. Likewise, argues Reeves, when Quality Control initiated its investigation of his timekeeping records in 1995, none of the supervisors from other departments were singled out for such scrutiny.

Considering all of the evidence in a light most favorable to Reeves, we nevertheless conclude that there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age. Despite the potentially damning nature of Chesnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination. In addition, Chesnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be terminated, and there is no evidence to suggest that any of the other decision makers were motivated by age. In fact, the record shows that at least two of the decision makers were themselves over the age of 50 - Ms. Sanderson at 52, and Jester at 56. Furthermore, the fact remains that, as a result of the 1995 investigation, each of the three Hinge Room supervisors was accused of inaccurate record keeping, including not only Reeves and Caldwell, but 35 year old Oswalt as well. Finally, there is

evidence that, at the time Reeves was dismissed, 20 of the company's management positions were filled by people over the age of 50, including several employees in their late 60's.

Based on our plenary review, we find that Reeves did not introduce sufficient evidence of age discrimination to support the jury's finding of liability under the ADEA. For this reason, we reverse and render judgment in favor of Sanderson.

REVERSED AND RENDERED.